90-1380

Supreme Court, U.S.
FILED
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In The Supreme Court Of The United States

CITY OF AUSTIN, TEXAS,
Petitioner

v.

JOLEEWU, LTD.,
Respondent

Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Respectfully Submitted,

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"QUESTIONS PRESENTED"

1. Should the Fifth Circuit Court of Appeals have rendered its decision in this case based upon an issue (theory of law) which was never stated, raised or briefed at any level by Joleewu, Ltd ?

2. Should the Fifth Circuit Court of Appeals have followed the Federal Rules of Appellate Procedure which require, under Rule 28(a)(4), that the argument of Appellant contain the contentions of the Appellant with respect to the issues presented and the reasons therefor, with citation to the authorities, statutes and parts of the record relied on ?

"QUESTIONS PRESENTED"
(Continued)

3. Does the City of Austin have a right to be informed of the issues presented on appeal and to respond to the arguments raised ?

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In The

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CITY OF AUSTIN, TEXAS,

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V.

JOLEEWU, LTD.,

Respondent

PETITION

FOR WRIT OF CERTIORARI

To the United States Court of Appeals for

the Fifth Circuit

Opinions Below

The original opinion in this cause was decided in the District Court for the Western District of Texas Austin Division. This opinion has not yet been reported. That opinion was appealed to the Court of Appeals for the Fifth Circuit, which opinion has not yet been reported either. Both opinions are included in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on November 1, 1990 and the Petition for Rehearing of Appellee, City of

Austin, was denied on November 19, 1990. The jurisdiction of this court is invoked under Rule 10 (a) of the Rules of the Supreme Court of the United States, which states that the Supreme Court will grant a writ of certiorari when a United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of its jurisdiction. The Fifth Circuit Court of Appeals has so departed from the accepted and usual course of judicial proceedings as to call for an excerise of the Supreme Court's jurisdiction. The Fifth Circuit Court of Appeals has so departed from the

accepted and usual course of judicial proceedings as to invoke the jurisdiction of the Supreme Court in that it failed to follow the Federal Rules of Appellate Procedure and relevant case law by rendering its decision based upon an issue (theory of law) that was never stated, raised or briefed at any level by Respondent, Joleewu, Ltd., (for purposes of this writ Joleewu, Ltd. will be referred to as "Respondent" and City of Austin will be referred to as "Petitioner") thus depriving Petitioner, the City of Austin, of its right to present its response to the argument of equitable estoppel raised on appeal. Since the Federal Rules of

Appellate procedure are rules of federal law, this is a federal question and Article III of the United States Constitution states that "the judicial power shall extend to all cases in law and in equity, arising from this Constitution, the laws of the United States . . . ." . See Filartiga v. Pena - Irala, 630 F.2d. 876, (2nd Cir. 1980), on remand 577 F. Supp. 860 (E.D.N.Y. 1984).

Statement

This suit was filed by Joleewu, Ltd. as an inverse condemnation suit, along with complaints for fraud in a real estate transaction, breach of contract, promissory estoppel and violations of the

5th and 14th Amendments to the U.S. Constitution. The decision of the United States District Court for the Western District of Texas, Austin Division, was to dismiss all complaints against the City of Austin. The inverse condemnation complaint was dismissed based on res judicata, and the complaints for fraud in a real estate transaction, breach of contract and promissory estoppel were dismissed based on governmental immunity. The complaints of violations of the 5th and 14th Amendments to the U. S. Constitution were part of the inverse condemnation complaint and were dismissed based on res judicata.

Joleewu, Ltd., appealed the decision to the United States Court of Appeals for the Fifth Circuit. In its decision, the Court of Appeals affirmed the decision of the District Court to dismiss Joleewu, Ltd.'s claims for fraud in a real estate transaction, breach of contract and promissory estoppel because they are barred by the doctrine of governmental immunity. However, the Court of Appeals reversed the decision of the District Court dismissing Joleewu, Ltd.'s claims for inverse condemnation and violations of the Fifth and Fourteenth Amendments to the U.S. Constitution because the Fifth Circuit asserted that

the City of Austin was "equitably estopped" to raise the defense of res judicata.

City of Austin's Petition for Rehearing was denied. The basis of such petition, as is the basis for this Petition for Writ of Certiorari, is that the defense of "equitable estoppel" was never raised at the District Court level or at the Appellate Court level by counsel for Joleewu, Ltd. Instead the Fifth Circuit in effect became counsel for Joleewu, Ltd., by raising the defense of equitable estoppel sua sponte and thereby denying the City of Austin due process and effective assistance of counsel because the City of Austin never

had the opportunity to brief or present at oral argument any response to the issue of equitable estoppel.

In addition, the Fifth Circuit Court of Appeals did not follow the Federal Rules of Appellate Procedure which, under Rule 28(a) thereof, require that the briefs of the appellant contain arguments with repect to the contentions of the appellant. Respondent, Joleewu, Ltd., has raised no argument with regard to equitable estoppel at any time, nor has it ever even mentioned the doctrine of equitable estoppel at any time.

Argument

The decision below should be reviewed because the actions of the Fifth Circuit judges rendering a decision based upon a different issue than those upon which appellant appealed have denied the City of Austin due process and effective assistance of counsel and have changed the premise of our adversarial system that appellate courts do not sit as self-directed boards of legal inquiry and research, but instead are arbiters of legal questions presented and argued by the parties before them. In addition, such actions by the Fifth Circuit judges have changed the character of our adversarial

system by removing the adversarial nature of it. In order to preserve the character of our adversarial system and to ensure that parties are not deprived of their due process rights nor of effective assistance of counsel, this Court should grant review.

The doctrine of equitable estoppel cannot be raised by the Fifth Circuit Court of Appeals in oral argument when such argument was not stated, briefed nor authorities given therefor by Respondent Joleewu, Ltd., at any time at the District Court level or at the Appellate level. Joleewu, Ltd. did not preserve such defense and therefore waived the defense

of equitable estoppel to res judicata.

Joleewu, Ltd. did not raise the defense of equitable estoppel in its Third Amended Original Complaint, nor did it allege any of the elements of such defense, even though it could have, as City of Austin had set forth its defense of res judicata to the inverse condemnation claim long before that, and Joleewu, Ltd. was quite detailed in all of its pleadings. In fact, Joleewu, Ltd. quite specifically labeled each one of its causes of action in its Third Amended Original Complaint, setting out six of them, and nowhere does it set forth the theory of equitable estoppel, even though City of Austin had already

plead res judicata. Further, in Joleewu Ltd.'s Brief to the Fifth Circuit it labeled its points of error, those being that res judicata did not apply because: (1) the subsequent condemnation suit is not res judicata to the prior inverse condemnation suit; (2) a subsequent suit cannot divest a court of jurisdiction of an issue properly before the Court; and (3) damages prior to the date of taking cannot be part of the condemnation award. None of these points of error nor any of the cases cited encompassed the defense of equitable estoppel.

Joleewu, Ltd. never raised the theory of equitable estoppel in its

Response to Defendant's Motion To Dismiss And For Summary Judgment. The most that Joleewu, Ltd. does in such Response is to mention that the damages sought in the present case were excluded from consideration in the condemnation case. In Appellant's Brief on appeal, Joleewu, Ltd. once again only stated that the damages sought in the present case were excluded from the condemnation case.

Joleewu, Ltd. did not state in any of the above-referenced documents that City of Austin made any false representations or adopted any inconsistent positions on which Joleewu

Ltd. relied to its detriment, nor did it allege anything in any way similar to that.

Instead, the issue of equitable estoppel was first raised, not by Joleewu, Ltd., but sua sponte by the Judges for the Fifth Circuit Court of Appeals. As a result, City of Austin did not address the issue of equitable estoppel in its reply brief, was not prepared to argue the issue at oral argument and did not even consider the defense of equitable estoppel until it was raised by the Fifth Circuit Court of Appeals at oral argument. The defense of estoppel cannot be raised by a district court sua sponte. Gillivan v.

Austin, 640 F. Supp. 1325 (D. Virgin Islands 1986). In that case, the Court stated that it could not raise that defense even though it wanted to. Furthermore, a party invoking the doctrine of estoppel must plead and prove each of the essential elements thereof, which include representation of a fact, rightful reliance thereon and injury or damage resulting from denial by the party making the representation. Steinberg v. Columbia Pictures Industries, Inc., 663 F. Supp. 706 (S.D.N.Y. 1987). Joleewu, Ltd. never mentioned the defense nor any one of its elements.

In addition, not only can the Court

not raise this doctrine sua sponte, but Joleewu, Ltd., in failing to raise the defense of equitable estoppel, waived the issue. Rule 28 (a) of the Federal Rules of Appellate Procedure provides:

> "The brief of the Appellant shall contain under appropriate headings and in the order here indicated:
>
> (4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the Appellant with respect to the issues presented, and the reason therefor, with citation to the authorities, statutes and parts of the record relied on."

According to Matter of Texas Mortgage Services Corp. v. Guadalupe

Savings & Loan Association, 761 F. 2d 1068 (5th Cir. 1985), Rule 28(a)(4) of the Federal Rules of Appellate Procedure has been construed as a mandate that the brief of the appellant contain a statement of the issues presented for review, and an argument portion which analyzes and supports those contentions. If issues are not raised and argued in the brief of the appellant, they are considered waived and will not be noticed or entertained by the Court of Appeals. McBride v. Merrell Dow and Pharmaceuticals, Inc. , 800 F. 2d 1208 (D.C. Cir. 1986). In Cannon v. Teamsters & Chauffeurs Union, 657 F. 2d 173 (7th Cir. 1981), "it was stated that it

would be patently unfair for the court to consider the new issue as properly before it since the other side had not been given advance warning that the issue would be raised." See also Environmental Defense Fund v. Costle, 657 F. 2d 275 (D.C. Cir. 1981) and United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976) (en banc) (per curiam), cert. denied, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed. 2d 250 (1977), the former of which states, "Considering an argument advanced for the first time in a reply brief, then, is not only unfair to an appellee" and the latter of which states: "but also entails the risk of an improvident or ill-advised opinion of the

legal issues tendered."

In fact, in Carducci v. Regan, 714 F. 2d 171 (D. C. Cir. 1983) that court pointed out carefully the dangers of Courts of Appeals attempting to remedy defects in the briefs of appellants when it stated: "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them. Thus, Rule 28(a)(4) of the Federal Rules of Appellate Procedure requires that Joleewu Ltd.'s brief contain "the contentions of the appellant with respect to the issues

presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Failure to enforce this requirement will ultimately deprive us in substantial measure of that assistance of counsel which the system assumes -- a deficiency that we can perhaps supply by other means, but not without altering the character of our institution."

There are numerous cases where the courts have adhered to the principle of not serving as counsel to one of the parties. In Morrison v. City of Baton Rouge, 761 F.2d 242 (5th Cir. 1985), the court stated that a ground urged by

plaintiffs for reversing a judgment was stated but not briefed. They, therefore, refused to consider that issue. The Fifth Circuit made the same type of ruling in Kemlon Products & Development Company v. United States, 646 F. 2d 223 (5th Cir.), cert. denied, 454 U. S. 863, 102 S. Ct. 320, 70 L. Ed. 162 (1981), and in Franceski v. Plaquemines Parish School Bd., 772 F. 2d 197 (5th Cir. 1985). In Picco v. Global Marine Drilling Co., 900 F. 2d 846 (5th Cir. 1990), the court held that an argument that was not presented to nor passed on by the district court, was not raised in the briefs to the court, and was not raised at any time prior to the

afternoon of oral argument, was not properly preserved for appeal and need not be reviewed by the court. The Seventh Circuit has held the same way, ruling in Reynolds v. East Dyer Development Co., 882 F.2d 1249 (7th Cir. 1989) that it would not consider argument which was not made in the opening brief and for which there was no citation of authority. It was also held improper to present new arguments in reply briefs.

The only case where the courts have agreed to consider an argument which was not briefed on appeal was Price v. Digital Equipment Corporation, 846 F. 2d 1026 (5th Cir. 1988). But there

were two reasons why the Court did so in that case and the reasoning was completely in line with the premise of not destroying our adversarial system of justice. The first reason was that in Price the appellant was pro se and the court desired to liberally construe the brief of appellant in order to assist him. The second reason was that because the issue had at least been stated by appellant, appellee had gone ahead and fully addressed the issue. Therefore, there was no prejudice to appellee and, as a result, there was no ineffective assistance of counsel on the part of appellee.

Raising the issue of equitable

estoppel at oral argument should not have been done by the Fifth Circuit judges in the present case because not only did Joleewu, Ltd. not brief the issue of equitable estoppel, including no argument or authority for it, Joleewu, Ltd. did not even plead or mention it. In addition, Joleewu, Ltd. was adequately represented by counsel who could have raised and briefed the issue. Finally, because the defense of equitable estoppel was never stated, raised or briefed by Joleewu, Ltd., City of Austin herein was totally unprepared to present its response to such defense and has never presented a response to such defense. City of Austin

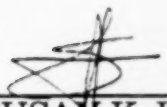
was, therefore, denied effective assistance of counsel while Joleewu, Ltd. had not only its counsel of record but the Fifth Circuit judges representing Joleewu, Ltd.

CONCLUSION

For the reasons that City of Austin was denied effective assistance of counsel, that the Fifth Circuit judges have changed the tenor of our whole adversarial legal system by effectively agreeing to represent Joleewu, Ltd. in its appeal to the Fifth Circuit, and that the Fifth Circuit failed to follow the Federal Rules of Appellate Procedure, it is respectfully submitted that this petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED,

IRIS J. JONES
CITY ATTORNEY



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CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the foregoing instrument have been sent by certified mail, return receipt requested to Robert Lybrand, attorney for Joleewu, Ltd. at 8333 Douglas Avenue, Suite 1215-LB, Dallas, Texas 75225, (214) 369-1077, on the 28th day of February, 1991.

Susan K. Lefler

Supreme Court, U.S.
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Appendix

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

JOLEEWU, LTD.,	)(	
	)(	
Plaintiff,	)(	
	)(	
v.	)(	CIVIL NO.
	)(	A-89-CA-627
CITY OF AUSTIN,	)(	
	)(	
Defendant.	)(	

ORDER

Came on this day to be considered Motion to Dismiss or in the alternative, for Summary Judgment of the City of Austin. After careful consideration, the Court is of the opinion that this motion is

meritorious and should be granted.

I. Background

This case involves a piece of land owned by the Plaintiff, Joleewu, Ltd., condemned by Defendant, the City of Austin, for the construction of roadway improvements, drainage improvements to an adjacent creek, and public utilities. The Defendant filed its Original Petition for Condemnation seeking condemnation of a portion of Plaintiff's land on July 28, 1988, in Probate Court No. 1 in Travis County, Texas. In November 1988, the commissioners, appointed in accordance with Texas law, issued their award of $169,000.00 to the Plaintiff for the land

condemned by the city. This suit was originally filed by the Plaintiff in state district court in early 1988 prior to the condemnation proceeding. Defendant removed the case to this Court in July 1989.

II. Parties' Contentions

A. Plaintiff's Contentions

Plaintiff alleges that from approximately June 1987 to January 1988, Defendant represented to the Plaintiff that temporary and permanent easements on certain portions of Plaintiff's property would be required for roadway and drainage improvements along an adjacent creek and for the utility work to

be conducted in connection therewith. Plaintiff alleges that the Defendant represented that the plans for such improvements were complete and an immediate necessity for acquisition of the easements existed. Further, Plaintiff alleges these representations as to the necessity for immediate access to easements and their immediate purchase or condemnation were false and made with actual awareness of their falsity or with reckless disregard.

Plaintiff's alleged damages resulted from lost rental income for approximately a year from 14 mobile home pad sites situated on the land

condemned. Rentals were allegedly lost because the city moved the tenants one year before the land was actually condemned. Plaintiff also seeks exemplary damages and attorney's fees.

In its amended complaint, Plaintiff alleges the following six causes of action:

1. That Defendant's condemnation of its land constitutes a taking without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Sections 17 and 19 of Article 1 of the Texas Constitution;

2. That Defendant's acts were

fraudulent in violation of Section 27.01 of the Texas Business Commerce Code;

3. That Defendant's acts constitute breach of contract;

4. That Defendant denied the Plaintiff "the rights secured to it by the Fifth and Fourteenth Amendments of the United States Constitution pursuant to established state procedure;"

5. That Plaintiff is entitled to recover from Defendant based on the doctrine of promissory estoppel; and

6. That Plaintiff is entitled to recover exemplary damages.

B. Defendant's Contentions

Defendant contends that it did not

deny Plaintiff the benefit and enjoyment of the property prior to the condemnation award which was deposited into the registry of the court on November 15, 1988.

III. Grounds for Dismissal

The party bringing a motion to dismiss under Rule 12(b)(6) bears the burden of demonstrating that no claim has been stated upon which relief can be granted. Sherrell v. City of Longview, 683 F. Supp. 1108, 1110 (E.D. Tex. 1988); 2A Moore's Federal Practice, para. 12.07[2.-5.]. A pleading should not be dismissed for failure to state a claim unless it appears beyond doubt that the pleader can prove no set of facts in

support of the claim which would entitle him or her to relief. Conley v. Gibson, 355 U.S. 41 (1957). Even if it appears on the face of the pleadings that recovery is very remote and unlikely, that is not the test, because in passing on a motion to dismiss, the allegations of the complaint should be construed favorably to the pleader. Scheuer v Rhodes, 426 U. S. 232 (1974); Haines v. Kerner, 404 U. S. 519, 520 (1972), reh. denied 405 U.S. 948.

Motions to dismiss under Rule 12 (b) (6) are not favored and are granted sparingly. Rios v. Dillman, 499 F. 2d 329 (5th Cir. 1974). A complaint upon which relief may be granted need only outline a

recognized legal or equitable claim which sufficiently pinpoints the time, place, and circumstances of the alleged occurrence and which, if later proven to the required legal degree, will justify some form of relief. Dorothy K. Winston & Co. v. Town Heights Development, Inc., 376 F. Supp. 1214 (D.D.C. 1974).

If material outside the pleadings are considered in ruling on a 12(b)(6) motion, the motion is considered as being for summary judgment. Fed. R. Civ. P. 56; see, e.g. Romero v. International Terminal Operating Co., 358 U.S 354 (1958), reh. denied, 359 U.S. 926. Consideration of matters outside the

pleadings is within the discretion of the court. See Sterans v. Veterans of Foreign Wars, 500 F. 2d 788 (D.C. Cir. 1974), on remand, 394 F. Supp. 599 (D.D.C.), aff'd 527 F. 2d 1387, cert. denied 429 U.S. 822.

A. No Evidence to Support a Taking

Defendant moves to dismiss all of Plaintiff's claims arising under Sections 17 and 19 of Article 1 of the Texas Constitution and under the Fifth and Fourteenth Amendments of the United States Constitution. Defendant argues that there is no evidence to support a taking, damaging or destroying of Plaintiff's land between November 1, 1987

until November 4, 1988. Defendant's principle contention is that it did not expel tenants from the portion of land to be acquired at any time prior to November 15, 1988. Defendant asserts it was acting according to federal law in advising tenants of the upcoming condemnation and in assisting them in their relocation. Plaintiff simply responds that Defendant cannot "offer summary judgment evidence to establish that it did not expel the tenants from the Plaintiff's land." Plaintiff's Response at 7.

A "taking" of land within the concept of Section 17, Article 1 of the Texas Constitution is an actual physical

invasion or an appropriation of the property. Hubler v. City of Corpus Christi, 564 S. W. 2d 816, 820 (Tex. Civ. App.--Corpus Christi 1978). In certain instances, acts short of actual physical invasion, appropriation or occupation can amount to a compensable taking where governmental agencies conducting public works projects have unreasonably interfered with the land owner's access to his property or have otherwise imposed restrictions that constitute an unreasonable interference with the land owner's right to use and enjoy his property. Id.; see Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922);

Dupuy v. City of Waco, 396 S.W. 103 (Tex. 1965).

The general rule is that announcement of a projected public improvement, together with preparation of plans and maps showing the property in question as within the limits of the project, without any actual interference with the owner's use, does not constitute a taking or compensable damaging, even though it may reduce marketability as a practical matter. Thurow v. City of Dallas, 499 S.W. 2d 347, 348 (Tex. Civ. App.--Dallas 1973, writ ref'd n.r.e.); see also Gully v. Southwestern Bell Telephone Co., 774 F.2d 1287, 1292 (5th Cir. 1985). In

extraordinary circumstances an equivocal manifestation of intention to take the property, followed by work on the project or other action which actually interferes with owner's use and enjoyment, may establish a taking or damaging requiring determination of the value at an earlier date. Thurow, 499 S.W. 2d at 348. Plaintiff would argue that this case is one in which extraordinary circumstances exists because of Defendant's relocation of tenants. However, the mere fact that tenants learn of contemplated condemnation and because of such information elect to vacate the property does not afford the

owner the right to recover damages from the state because there has been neither a taking or any character of a physical invasion of the property. State v. Vaughan, 319 S.W.2d 349, 354 (Tex. Civ. App.--Austin 1959, no writ). "The loss of tenants and the resulting loss of rental . . . [is] incidental or consequential to the taking of the entire property . . . [and] the state is not liable for such consequential damage." Id. at 354-55.

The extent of Defendant's interference in the use of Plaintiff's land prior to the condemnation award is unclear. Defendant argues that it was only doing what was required of it by

federal law. The law which Defendant cites as authority is as follow:

> Notice of relocation eligibility: Eligibility for relocation assistance shall begin on the date of initiation of negotiations (defined in Section 24.2(k)) for the occupied property. When this occurs, the Agency (the Federal Agency, State, or State Agency which acquires real property or displaces a person) shall promptly notify all occupants in writing of their eligibility for applicable relocation assistance.

Federal Register, Vol. 52, No. 242, Pg. 48003, under Relocation Notices, Section 24.203[4](b) (emphasis added). The regulation does not require the state

agency to actually relocate occupants of the condemned property as Defendant asserts. Therefore, if Plaintiff can show that the Defendant's removal was unauthorized and substantially interfered with its use of the property, Plaintiff maybe entitled to damages. Accordingly, this ground of dismissal will be denied.

B. Plaintiff's Claims of a Taking without Just Compensation are Barred by Res Judicata

Defendant asserts that the Plaintiff has been totally compensated for the portion acquired in a prior lawsuit, and all claims should be barred by the doctrine of res judicata. The prior

lawsuit to which Defendant refers is the condemnation proceeding it filed in July 1988. In the prior proceeding, the special commissioners entered an award in the amount of $169,000.00 for the land acquired on November 15, 1988. No objections were filed by the Plaintiff complaining of the award; and therefore, Defendant contends, Plaintiff has waived its right to raise the issue of damages in this case.

Plaintiff argues that it has neither requested any recovery for the value of easements taken nor damages to the remainder in this case. Rather, all damages sought by the Plaintiff herein

are for damages which resulted prior to the taking of the easement by condemnation.

"Res judicata is frequently characterized as claim preclusion because it bars litigation of all issues connected with a cause of action or defense which, with the use of diligence, might have been tried in the prior suit. Bonniwell v. Beech Aircraft Corporation, 663 S.W.2d 816,818 (Tex. 1984), citing Russell v. Moeling, 526 S.W. 2d 533 (Tex. 1975). When a prior judgment is offered in a subsequent suit in which there is identity of parties, issues and subject matter, such judgment is treated as an

absolute bar to retrial of claims pertaining to the same cause of action on the theory that they have merged into the judgment. Id. The rule of res judicata in Texas bars litigation of all issues connected with a cause of action or defense which, with the use of diligence, might have been tried in a former action as well as those which were actually tried. Ogletree v. Crates, 363 S.W.2d 431 (Tex. 1963); Stewart v. City of Austin, 744 S.W.2d 682, 685 (Tex. App.--Austin 1988, writ ref'd). A party cannot relitigate matters which he might have interposed, but failed to, in an action between the same parties or their privies in reference

to the same subject matter. Id.; Abbot Laboratories v. Gravis, 470 S.W.2d 639 (Tex. 1971).

Plaintiff argues that the Defendant is "required to prove that the prior suit involved the same issues, facts, and damages involved in this case." Plaintiff's Response at 9. "The excerpt of the transcript of the Commissioners' Hearing establishes the damages sought in the instant [sic] were clearly excluded from consideration in the condemnation proceeding." Id. at 9. Further, "Defendant has failed to offer any authority for the proposition that its later suit could affect claims that were already

subject of a suit at the time of the condemnation was filed." Id. Defendant argues, on the other hand, that "Plaintiff opted not to try his present claim for damages during the prior [condemnation] proceedings." Defendant's Motion at 10.

According to Texas statute Section 21.014(b), Tex. Prop. Code Ann., the commissioners' duty it to "assess damages fairly, impartially, and according to the law." Where condemnation of property is sought by a party having the power of eminent domain, all questions that may arise in such proceedings, must and should be

determined in condemnation proceedings, such as . . . the amount of damages . . . for the reason that in all such cases the statutes regulating the condemnation of property apply and must therefore control. Benat v. Dallas County, 266 S.W. 539, 541 (Tex. Civ. App.--Dallas, 1924, no writ). A landowner in condemnation proceedings may raise any issue challenging the legality of a proposed taking. Jones v. Missouri-Kansas Texas R. Co. of Texas, 14 S.W. 2d 357 (Tex. Civ. App.--Dallas 1929), aff'd 24 S.W. 2d 366 (Tex. Comm'n App. 1930). Once damages are assessed for the condemned land, the party whose

land is taken may object to the finding. Tex. Prop. Code Ann. Section 21.018(a) (Vernon 1984). Once the commissioners appointed in a condemnation proceeding fix the value of a parcel of land, all interested parties are bound by the commissioner's report unless they object to the award. United States v. 16,572 Acres of Land, 49 F.Supp 555 (D.C. Tex. 1943); see also State v. Nelson, 334 S.W.2d 788 (Tex. 1960); Day v. Wooten, 545 S.W.2d 16 (Tex. Civ. App.--Dallas 1976, writ ref'd n.r.e.).

All the necessary elements of res judicata have been proven. The identities of the parties are the same as well as the

issues and the subject matter. The condemnation proceeding was instigated by the city to determine the amount of damages owed to the Plaintiff. Most of Plaintiff's claims in this suit also seek a determination of the amount of damages due to Plaintiff for the land taken. Plaintiff is seeking lost rental income which allegedly resulted from the Defendant's intention to condemn the land. Lost rental income may have been relevant to the commissioner's determination of damages.

Plaintiff argues that certain issues of damages were excluded from consideration at the commissioner's

hearing, and therefore cannot be barred in this suit. True, the City Attorney present at the hearing informed the commissioners of the pending lawsuit and recommended that all issues addressed in that hearing be excluded from consideration. See Commissioners' Hearing Transcript at 139-40. Yet, Plaintiff failed to object at the hearing or timely file objections to the award. The purpose of the commissioners' hearing was to determine the amount of damages owing to the Plaintiff, and once the time for filing objections passed, the award became final. If Plaintiff had objected to the award, it would have been able to

present all issues effecting the value of the land, including lost rental income, to the county court. See Glade v. Dietert, 295 S.W. 2d 642, 646 (Tex. 1956). Therefore, Plaintiff's claims of taking without compensation or due process in violation of Fifth and Fourteenth Amendments to the United States Constitution, as well as in violation of Sections 17 and 19, Article 1 of the Texas Constitution are barred by the doctrine of res judicata and will be dismissed.

C. Defendant is Immune from Liability for Fraud

Defendant moves this Court to

dismiss Plaintiff's claim for fraud in a real estate transaction pursuant to Section 27.01 of the Texas Business and Commerce Code based on the doctrine of governmental immunity. Plaintiff argues that governmental immunity is not available where the conduct of such government amounts to a taking in violation of the Texas Constitution. Defendant does not dispute that immunity will not bar liability on the issue of taking, but rather asserts immunity from the fraud cause of action only.

Acquiring an interest in land for roadway and drainage improvements involves a governmental function. Tex.

Civ. Prac. & Rem. Code, Section 101.021 (Vernon 1990); see also Tex. Civ. Prac. & Rem. Code, Section 101.021 (Vernon 1986). Therefore, the Defendant is immune from liablity for fraud and this cause of action for fraud will be dismissed.

D. Defendant Cannot Enter into a Contract in Derogation of the Municipality's Governmental Function.

Defendant argues that Plaintiff's claim for breach of contract to conduct immediate negotiations for the acquisition of the easements or to immediately condemn such easements should be dismissed because such a

contract would be unenforceable. In response, Plaintiff simply states,"[t]he contract alleged by the Plaintiff was not one by which the Defendant agreed to forgo [sic] a statutory duty or to refrain from exercising its governmental powers, as is the situation in the cases cited [by the Defendant]." Plaintiff's Response at 14. "The Defendant agreed that if the Plaintiff would allow tenants to be moved from the land the Defendant would acquire the land." Plaintiff's Response at 14.

A contract in derogation of the municipality's governmental function is unenforceable. City of Farmer's Branch

v. City of Addision, 694 S.W. 2d 94 (Tex. Civ. App.--Dallas 1985, writ ref'd n.r.e.). The city cannot, by contract or otherwise, surrender its governmental or legislative functions, nor can it legally enter into any contract which will embarrass or control its legislative powers and duties or which amount of an abdication of its governmental functions or its police power. Fidelity Land & Trust Co. of Texas v. City of West University Place, 496 S.W. 2d. 116 (Tex. Civ. App.--Houston 1973). Therefore, a claim for breach of contract for failure to immediately negotiate or condemn the easements in question cannot lie against the Defendant and will

be dismissed.

E. The Theory of Promissory Estoppel is Not Available

Plaintiff's claims for promissory estoppel is based on its allegations that the Defendant represented that there was a need for immediate acquisition of the easements in question, and that condemnation was imminent. Defendant urges dismissal of this claim based on the unavailability of the theory of promissory estoppel to enforce a governmental act.

The theory of estoppel cannot be used to force a govermental entity into performing a govermental function in a certain way. International Bank of

Commerce of Laredo, 635 S.W. 2d 539 (Tex. Civ. App.--San Antonio 1983, writ ref'd n.r.e.). When a governmental unit is exercising governmental powers it is not subject to estoppel. Leeco Gas & Oil Co. v. Nueces County, 736 S.W.2d 629, 633 (Tex. 1987). Therefore, the cause of action for promissory estoppel is not an available theory to force a city to perform a governmental function, and this cause of action brought against the Defendant will be dismissed.

Accordingly,

IT IS ORDERED that Defendant's Motion to Dismiss is GRANTED and all claims against Defendant be DISMISSED.

SIGNED this 10th day of January 1990.

WALTER S. SMITH, JR
(signature)

UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JOLEEWU, LTD.	JUDGMENT IN A CIVIL CASE
V.	
CITY OF AUSTIN	CASE NO. A-89-CA-627

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it verdict.

_X_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's Motion to Dismiss is GRANTED and all claims against Defendant be DISMISSED.

Costs assessed against Plaintiff and in favor of Defendant.

CHARLES W. VAGNER
Clerk

January 11, 1990
Date

/s/ Kim Kruemche
(By) Deputy Clerk

JOLEEWU, LTD. v. CITY OF AUSTIN

JOLEEWU, LTD., Plaintiff-Appellant,

v.

CITY OF AUSTIN, Defendant-Appellee.

No. 90-8149

United States Court of Appeals,

Fifth Circuit

Nov. 1, 1990.

Mobile home park owner filed suit against Texas city, seeking damages for inverse condemnation, fraud, breach of contract, and promissory estoppel. Following removal, the United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., granted city's motion to dismiss. On appeal, the Court of Appeals, Edith H. Jones, Circuit Judge, held that under Texas law: (1) city

was equitably estopped to assert res judicata defense to inverse condemnation claim by virtue of representations made to special commissioners; (2) city was immune from liability for fraud in connection with acquisition of land for public improvements, a governmental rather than proprietary function; and (3) any contract between city and landowner purporting to dictate when city had to initiate condemnation proceedings was unenforceable.

Affirmed in part, and reversed in part.

1. Judgment - key no. 619, 713(2), 720

Under Texas law of res judicata, judgment in first suit precludes second action by parties and their privies not only on matters actually litigated but also on causes of action or defenses which arise

out of the same subject matter and which might have been litigated in the first suit.

2. Estoppel - key no. 68(2)

Under Texas law, one party must be estopped to assert legal position against another if that position is inconsistent with previous one.

3. Estoppel - key no. 62.4

Under Texas law, city was equitably estopped to assert res judicata defense to inverse condemnation claim, arising out of its delay in instituting condemnation proceedings, by virtue of its specific representation in proceedings before special commissioners in condemnation that parties would not be contesting precondemnation damages before their tribunal and that their award consequently would not include such

damages; property owner had not filed objections to award because it believed, relying on city's representations, that it would have opportunity to recover disputed damages in lawsuit and would lose opportunity to recover those damages if city were not so estopped.

4. Estoppel - key no. 62.4

Under Texas law, municipal or quasimunicipal corporation may be estopped where justice, honesty, and fair dealing require it.

5. Municipal Corporations - key no. 724

Under Texas law, city was immune from liability for alleged fraud in connection with acquisition of land for public improvements, a governmental rather than proprietary function. V.T.C.A., Civil Practice & Remedies

Code, Section 101.0215(a)(3, 9, 22, 32).

6. Municipal Corporations - key no. 247

Under Texas law, contract restricting city's freedom in choosing when to acquire property is in derogation of governmental function and is unenforceable.

Appeal from the United States District Court for the Western District of Texas.

Before JONES, DUHE and WIENER, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Plaintiff-appellant Joleewu, Ltd. sued the City of Austin in the district court of Travis County, Texas seeking damages for inverse condemnation,

fraud, breach of contract, and promissory estoppel. The City removed the case to federal court and moved for dismissal of all claims under Fed.R.Civ.P. 12(b)(6). The United States District Court for the Western District of Texas granted the motion and dismissed Joleewu's complaint. We reverse and remand the dismissal of Joleewu's inverse condemnation claim but otherwise affirm the judgment of the district court. The treacherous trial tactics employed by the City have, as we explain later, disserved its sovereign responsibility to one of its citizens and to our courts.

I.
FACTS AND PROCEEDINGS BELOW

Because this case was dismissed on the pleadings, we recite the facts as

they appear in Joleewu's complaint. In April 1987, the City of Austin sought to obtain an easement over a portion of Joleewu's Bel-Air Mobile Home Park in order to construct roadway, drainage, and utility improvements. While the City was negotiating with Joleewu over the price to be paid for the easement, the City notified the 14 tenants living on the property that it would soon either purchase or condemn the land under their lots. By November, all of those tenants had abandoned their lots, most having relocated with the assistance of the City. Joleewu cooperated in the relocation, allegedly relying on the City's representations that it needed the easement immediately and that it would commence condemnation proceedings without delay. When, nearly four months later, the City had neither reached an

agreement with Joleewu nor initiated any formal proceedings to condemn the property, Joleewu filed suit against the City in the district court of Travis County, Texas. Joleewu's "inverse condemnation suit" alleged that the City had taken its property without just compensation in violation of article I, section 17, of the Texas Constitution.

While Joleewu's lawsuit languished in state court, the City at last commenced formal proceedings to condemn the subject property on July 28, 1988. Pursuant to Texas procedure, three special commissioners were appointed to determine the fair market value of the property taken. The commissioners took testimony about the property's value at a hearing in November 1988 and later that month awarded Joleewu $169,000 for the easement taken. Neither party filed

objections to the award, and it became final in January 1989. In July 1989, Joleewu amended its state court complaint to add a claim for inverse condemnation under the Just Compensation Clause of the United States Constitution. The company sought $24,640 in damages for lost rental income from the 14 mobile home spaces, plus attorney's fees. The federal constitutional question allowed the City to remove the case to federal district court. Removal paved the way for the Rule 12(b)(6) dismissal challenged by Joleewu.

II.
INVERSE CONDEMNATION CLAIM

The district court denied the City's motion to dismiss Joleewu's inverse condemnation damage claim based on

lack of evidence to prove a taking, but it granted the motion on the theory that the claim was barred by res judicata. The court held that Joleewu could have, or should have, asserted the claim in the condemnation proceeding, notwithstanding the City's representations to the special commissioners that the parties would try the claim in the instant lawsuit. Although res judicata would normally bar Joleewu's claim, the City is equitably estopped to assert that defense.

A. *Res Judicata*

[1] Under full faith and credit principles, every court within the United States, federal and state, must give the same effect to the judgment of a state court as would the courts of that state. *See* 28 U.S.C., Section 1738; *Parsons*

Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 523, 106 S.Ct. 768, 771, 88 L.Ed. 2d 877 (1986). Therefore, we look to the law of Texas to determine the preclusive effect of the commissioners' award in condemnation. The Texas Supreme Court has adopted the following formulation of res judicata: "the judgment in the first suit precludes a second action by the parties and their privies not only on matters actually litgated but also on causes of action or defenses which arise out of the same subject matter and which might have been litigated in the first suit." *Texas Water Rights Comm'n v. Crow Iron Works,* 582 S.W.2d 768, 771-72 (Tex. 1979); *see also Gracia v. RC Cola-7-Up Bottling Co.*, 667 S.W.2d 517, 519 (Tex. 1984).[1]

1. Joleewu attempts to forestall the application of res judicata altogether by pointing out that the City's condemnation

action was commenced subsequent to Joleewu's inverse condemnation action. Joleewu cites no case explicitly declining to apply res judicata in such a situation, and we assume that Texas courts would follow the general rule that "a judgment, otherwise entitled to res judicata effect in a pending action, [is not] to be deprived of such effect by the fact that the action in which it was rendered was commenced later than the pending action." *Restatement (Second) of Judgments*, Section 14 comment a (1982); *see also Gresham Park Community Org. v. Howell*, 652 F.2d 1227, 1241 (5th Cir. Unit B Aug. 1981).

The parties agree that Joleewu could have litgated its inverse condemnation claim in the condemnation proceeding before the special commissioners, because that claim arose out of the same subject matter as the City's condemnation of Joleewu's property.[2] Because the claim for precondemnation damages "might have been litigated" in the condemnation

proceeding before the commissioners, the City could normally raise the defense of res judicata in subsequent actions. In this case, however, the City's conduct in litigation precludes it from invoking res judicata.

2. *See Glade v. Dietert,* 156 Tex. 382, 388, 295 S.W.2d 642, 646 (1956) (plaintiffs could recover "in the county court, in the case now pending on appeal from the award of the commissioners, . . . all damages to which they may be entitled, including the diminishment of the land value caused by the [pre-condemnation trespass]"); *Alexander v. City of San Antonio,* 468 S.W. 2d 797,798 (Tex. 1971) (*Glade* held that "damages flowing from a prior trespass on land could be recovered in a suit to condemn the land on which the trespass occurred"); *see also Stewart v. City of Austin*, 744 S.W. 2d 682, 685 (Tex. Ct. App. 1988) (claim that city lacked authority to condemn was barred by res judicata once commissioners' award became final judgment).

B. Equitable Estoppel

[2] Under Texas law, one party may be estopped to assert a legal position against another if that position is inconsistent with a previous one: "Where one takes one position in a judicial proceeding, he cannot later take a plainly inconsistent position in another proceeding." *Washburn v. Associated Indem. Corp.*, 721 S.W.2d 928, 933 (Tex. Ct. App. 1986), *writ refused,* 735 S.W. 2d 243 (Tex. 1987); *see also Moore v. Means,* 549 S.W. 2d 417, 419 (Tex. Civ. App. 1977) (same). [3] Although proceedings before the special commissioners in condemnation are technically "administrative" rather than "judicial," *see Lo-Vaca Gathering Co. v. Gardner,* 566 S.W. 2d 366, 368 (Tex. Civ.App. 1978), we conclude that

representations made to the special commissioners may become the basis of a "prior inconsistent judicial position as that term is used in *Washburn.*

3. Equitable estoppel by inconsistent positions in judicial proceedings is distinguished from the doctrine of "judicial estoppel." the latter does not require reliance and injury, but it must be based upon a statement under oath. *See Long v. Knox,* 155 Tex. 581, 585, 291 S.W.2d 292, 295 (1956); *Washburn*, 721 S.W. 2d at 931-32.

The *Washburn* court grappled with an equitable estoppel issue in the context of a workers' compensation proceeding before the Industrial Accident Board followed by a suit in state district court. The claimants argued that the insurance carrier had taken inconsistent positions in the two different fora. The appellate court found the position

asserted before Board to be a "prior inconsistent judicial position." The court reasoned: "The function of the board is quasi-judicial; its award is entitled to the same faith and credit as the judgment of a court; and it is not subject to judicial attack." 721 S.W.2d at 932 (citing *Moore*, 549 S.W.2d at 418). In these respects, the special commissioners are similar to the Board. The commissioners' award, if not set aside on direct appeal, is entitled to the same faith and credit as the judgment of a court. *See* Tex. Prop. Code Ann., Section 21.061 (Vernon 1984) ("If no party in a condemnation proceeding files timely objections to the findings of the special commissioners, the judge . . . "). "Moreover, as detailed in the margin, both bodies have similar procedural powers, and parties may "appeal" to the courts from the decisions of both bodies.[4]

4. *Compare id.* Section 21.014(c) (Vernon 1984) ("Special commissioners may compel the attendance of witnesses and the production of testimony, administer oaths, and punish for contempt in the same manner as a [District Court].") *and id.* Section 21.018(a) ("A party to a condemnation proceeding may object to the findings of the special commissioners by filing a written statement of the objections and their grounds with the court . . . on or before the first Monday following the 20th day after the [findings are].") *with* Tex.Rev. Civ. Stat. Ann. art 8307, Section 4(c) (Vernon Supp. 1990) ("The Board or any member thereof shall have the power to subpoena witnesses, administer oaths, . . . [and] punish for contempt in the same manner and to the same extent as a District Court may do.") *and id.* art. 8307, Section 5 ("Any interested party who is not willing and does not consent to abide by the final ruling and decision of said Board shall . . . within twenty (20) days after giving [notice] bring suit . . . to set aside said final ruling and decision.").

We note the commissioners also have been painted with the label "quasi-judicial," even if obliquely. *See Texas Elec. Serv. Co. v. Campbell*, 328 S.W.2d 208, 213 (Tex. Civ. App. 1959) (referring to commissioners "sitting . . . in a quasi-judicial capacity as officers of the court") *rev'd on other grounds*, 161 Tex. 77, 336 S.W. 2d 742 (1960).

On the record, the City has taken inconsistent judicial positions. At the hearing to ascertain damages for the City's condemnation of easements across Joleewu's moblie home park, one of the special commissioners inquired about the events before the formal initiation of condemnation proceedings. Counsel for the City interrupted this inquiry:

> At this time I want to admonish the commissioners not to consider, prior to the date of taking, losses by reason of these trailers [being] moved. There is another lawsuit pending. . . .

. . . . . .

> So consequently, I am asking you-all not to consider that, *because that is going to be taken care of by negotiations or by trial in that particular lawsuit.*

R. 168-69 (emphasis added). The City specifically represented to the special commissioners that the parties would not be contesting pre-condemnation damages before their tribunal and that the award of the commissioners consequently would not include such damages. In terms of res judicata, the City essentially represented to the court that it would not assert the defense in the other lawsuit between the parties. Yet that is precisely what the City has done.

[3] Equitable estoppel bars the taking of inconsistent positions in judicial proceedings only if two other elements--reliance and injury of the opposing party--are also established. *Washburn*, 721 S.W. 2d at 932. Injury is clearly present: if the City is not estopped to claim that Joleewu's inverse condemnation claim is barred by res judicata, Joleewu will lose the opportunity to recover the $24,640 in pre-condemnation damages it allegedly suffered at the hand of the City.

Reliance is also established on this record. When the City explained to the special commissioners that the parties would settle those damage issues or litigate them in another forum, counsel for Joleewu concurred: "And I am in

agreement with [the Assistant City Attorney]." The district court, in dismissing Joleewu's claim, made much of the fact that Joleewu "failed to object at the hearing or timely file objections to the award." These failures to object are not even surprising, let alone culpable. Joleewu did not object at the hearing because it relied on the City's apparent good faith in representing that those damage issues would be litigated in the instant lawsuit; Joleewu did not file objections to the award because it believed, relying on the City's representations, that it would have the opportunity to recover the disputed damages in the instant lawsuit.

[4] Only one barrier might prevent applying equitable estoppel to the City's res judicata--the doctrine that "estoppel

does not [as a rule] apply against a unit of governmental functions." *Clear Lake City Water Auth. v. Winograd,* 695 S.W. 2d 632, 640 (Tex.Ct.App. 1985) (citing *City of Hutchins v. Prasifka,* 450 S.W.2d 829, 835 (Tex. 1970)). This doctrine has a well-established exception, however: "a municipal or quasi-municipal corporation may be estopped, where justice, honesty, and fair dealing require it." *Id.* (citing cases). Justice, honesty, and fair dealing require estoppel in this case. By its representations, the City induced Joleewu not to present evidence of pre-condemnation damages and induced the commissioners not to award such damages. Whether intentionally or negligently, the City then abandoned these representations in an attempt to take advantage of Joleewu in federal court. As we suggested at oral argument,

this borders on sanctionable conduct; it certainly bears no resemblance to fair dealing.

The City has asserted--in a manner devoid of justice, honesty, and fair dealing-- inconsistent judicial positions. Joleewu relied on the prior position to its injury. Therefore, the City is equitably estopped to raise the defense of res judicata to Joleewu's inverse condemnation claim for damages. The judgment dismissing this claim is reversed, and the claim is remanded for trial.

III.
OTHER CLAIMS

The district court also dismissed Joleewu's state-law claims for fraud in a real estate transaction, breach of

contract, and promissory estoppel. Because these claims are barred by the doctrine of governmental immunity under Texas law, we affirm the dismissal.

A. Fraud in a Real Estate Transaction

[5] Joleewu alleged that the City is liable under Tex.Bus. & Com. Code Ann., Section 27.01 (Vernon 1987) for damages arising from "fraud in a real estate transaction," because it falsely represented that if Joleewu would relocate its mobile home tenants, the City would initiate condemnation proceedings without delay. Even if, as Joleewu asserts, the City of Austin is a "person" within the meaning of the statute, the City is immune from liability for fraud in this case. The rule of municipal immunity in Texas distinguishes between

proprietary and governmental functions:

> A city is liable for torts committed by its employees when the city is performing a proprietary function. On the other hand, a city is immune from liability for torts committed by its employees when the city is performing a governmental function unless the state by statute has waived immunity.

City of Roundrock v. Smith, 687 S.W.2d 300, 302 (Tex. 1985).[5] By judicial interpretation and more recently by statute, the acquisition of land for a public purpose is a governmental function. *See Leeco Oil & Gas Co. v. Nueces County,* 736 S.W.2d 629, 630 (Tex. 1987); Tex. Civ. Prac. & Rem. Code Ann., Section 101.021(a)(3), (9), (22), (32) (Vernon 1986). The City's allegedly fraudulent actions

arose from the acquistion of Joleewu's land for public improvements. Thus, the City is immune from liability for fraud.

5. The Texas Tort Claims Act, which waives municipal immunity for injuries arising from the operation or use of motor vehicles and from the condition or use of tangible personal or real property, obviously does not apply here. *See* Tex. Civ. Prac. & Rem. Code Ann., Section 101.021 (Vernon 1986).

B. Breach of Contract

[6] Joleewu also asserts a breach of contract claim against the City for the same representations. The City is immune to this claim, however, for "a contract in derogation of the municipality's governmental function is unenforceable." *City of Farmers Branch v. City of Addison,* 694 S.W.2d 94, 95 (Tex. Ct. App. 1985). If the acquisition of land for a public purpose is a governmental

function, so is the decision about the timing of the acquisition. A contract restricting a city's freedom in choosing *when* to acquire property is thus a contract in derogation of that function. *See also Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385, 391 (Tex. 1977) (municipal authority "could not, by contract or otherwise, bind itself in such a way as to restrict [the] free exercise of [its] governmental powers"); *Cibolo Creek Mun. Auth. v. City of Universal City*, 568 S.W.2d 699, 702 (Tex. Civ. App.1978) ("municipal entity cannot . . . legally enter into any contract which will embarrass or control its legislative powers or duties"). Any contract between the City and Joleewu that purported to dictate when the City must initiate condemnation proceedings is unenforceable. The district court

properly dismissed Joleewu's claim.

C. Promissory Estoppel

Joleewu finally seeks damages for these very same actions of the City under a theory of promissory estoppel. Because Joleewu abandoned this theory at oral argument, we affirm the dismissal of this claim.

IV.

For the foregoing reasons, the judgment of the district court dismissing Joleewu's complaint is reversed and remanded as to the inverse condemnation claim and affirmed as to all other claims.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Adm. Office, U.S. Court--West Publishing Company, Saint Paul, Minn.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 90-8149

JOLEEWU, LTD.,

Plaintiff-Appellant,

versus

CITY OF AUSTIN,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

---

ON PETITION FOR REHEARING

(November 29, 1990)

Before JONES, DUHE and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

EDITH H. JONES
United States Circuit Judge

November 26, 1990

Supreme Court, U.S.
FILED
APR 1 1991
OFFICE OF THE CLERK

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No. 90-1380

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1990

CITY OF AUSTIN, TEXAS,
Petitioner

V.

JOLEEWU, LTD.,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals had discretion to reverse the Trial Court's Order of Dismissal based upon the doctrine of equitable estoppel.

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STATEMENT OF THE CASE

The "Opinions Below" section of the Petition for Writ of Certiorari accurately summarizes the proceedings below. Petitioner's "Statement of Jurisdiction" does not share that accuracy.

JURISDICTION

Petitioner confuses the Supreme Court's jurisdiction to entertain the Writ of Certiorari with the Supreme Court's statement of its considerations in granting that discretionary review.[1]

The Supreme Court of the United States has jurisdiction to review this decision of the Fifth Circuit Court of Appeals Court under 28 U.S.C. Sec. 1254 (1) as this is a Petition for Writ of Certiorari by a party to a civil case

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[1] Pet. at 2-5.

after rendition of decree.

The Supreme Court should not grant a Writ of Certiorari in this case as the conduct of the Fifth Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings.

RESPONSE TO PETITIONER'S STATEMENT

Petitioner's "Statement" contains a generally accurate recitation of facts until it strays into argument. Respondent take exception to Petitioner's assertions that "... the Fifth Circuit in effect became counsel for Joleewu, Ltd.,..." and denied "... the City of Austin due process and effective assistance of Counsel."[2] Respondent likewise takes exception to Petitioner's claim that the Court of Appeals "... did not follow the Federal Rules of Appellate

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[2] Pet. at 8.

Procedure...".[3] It is Respondent's position that those statements are not correct.

Just as Petitioner's "Statement" section contains material more accurately labeled argument, Petitioner's "Argument" section includes assertions of fact.[4] Any response to factual misstatements in Petitioner's arguments will be contained in the corresponding section of this brief.

ARGUMENT

Respondent's Appeal Brief clearly raised the issue of the inapplicability

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[3] Pet. at 9.

[4] Petitioner characterizes Respondent's Appeal Brief as stating only "...that damages sought in the present case were excluded from the condemnation case." Pet. at 14.

of res judicata.[5] The last paragraph of Respondent's res judicata arguments states:

"The attorneys for both AUSTIN [Petitioner] and JOLEEWU [Respondent] recognized that the commissioners' hearing was not the forum for such a recovery. (Tr. 167-170, Appendix)[6]. The damages sought by JOLEEWU in this case were clearly excluded from the commissioners' award by both applicable law and agreement of the parties, thus the judgment cannot be a bar to litigation involving the recovery of those

---

[5] Res. App. at 1-6.

[6] Pages "Tr. 167-170", as contained in Respondent's Record Excerpts filed with the Court of Appeals, are attached hereto as App. 7 through App. 14.

damages."[7]

Petitioner asserts that the issue upon which the Court of Appeals based its decision was "never stated, raised or briefed at any level."[8] The language quoted above puts into issue the effect of the statement at the commissioner's hearing on the use of the condemnation judgment as a bar to this litigation.

A review of the excerpts of Respondent's Appeal Brief shows that the issue of res judicata was raised, just as it shows that no authority on "equitable estoppel" was offered.[9] Respondent's oral argument before the Court of Appeals did not include arguments regarding equitable estoppel, nor for that matter,

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[7] *Id.* at 3.

[8] Pet. at 4.

[9] Res. App. 1 - 6.

any argument regarding res judicata.[10]

The conspicuous absence of two items taint the Petitioner's cry of ambush and unfair advantage. The first is the absolute failure to assail the correctness of the Court of Appeals' decision. The second is the unexplained absence of Respondent's Appeal Brief from the materials brought forward by Petitioner.

Missing from the accusations of "hometown officiating" is any accusation

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[10] Circuit Judge Jones informed Respondent at the outset of its argument that Respondent's interpretation of res judicata had been found lacking but reversal would nevertheless occur based on equitable estoppel. Like the condemned who observes the rope being cut just as it tightens around his neck, counsel moved on to other issues without comment about the discomfort of the noose.

that the call was wrong. The Petitioner does not assert that the decision was wrong, but only that it was based upon an issue that the Court of Appeals could not consider.

The second omission, Petitioner's failure to include any part of Respondent's Appeal Brief in the materials brought forward to this Court, is even more revealing. The very device of judicial ambush is omitted as proof of the foul deed. The reason for this omission is the marked contrast between the contents of Respondent's Appeal Brief[11] and Petitioner's characterization of the contents of that brief.[12]

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[11] Res. App. 1 - 6.

[12] Petitioner characterized Respondent's Appeal Brief as stating only "...that damages sought in the present case were excluded from the

Petitioner also fails offer any legal authority in support of it claim that it was denied due process and effective assistance of counsel. Petitioner's failure to address the merits of the Court of Appeals' decision in its Motion for Rehearing forecloses any due process argument. Respondent is unaware of any law or doctrine that affords a municipality - a legally protected right to effective counsel.[13]

The fundamental weakness of

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sought in the present case were excluded from the condemnation case." Pet. at 14.

[13] The factual basis for any claim of counsel's ineffectiveness in assisting Petitioner may be ascertained from Court of Appeals' opinion below and the material brought forward to this Court.

Petitioner's argument is exposed by Petitioner's parenthetical redefinition of issue.[14] This semantic juxtaposition is crucial to Petitioner's argument. If issue means issue, and the issue of res judicata was raised, Petitioner has no argument. Neither case nor statutory authority confines the Court of Appeals to the legal theories and case authorities briefed. Petitioner fails to offer any authority for its claim that issue means theory of law. Respondent is unaware of authority for the proposition that issue does not mean issue.

The issue of inapplicability of res judicata was raised by the Respondent.

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[14] "...by rendering its decision based upon an issue (theory of law) that was never stated, raised or briefed at any level by Respondent, Joleewu, Ltd." Pet. at 4.

FED. R. APP. P. 28(a)(2)&(4)[15] requires the Respondent's brief to contain:

(a) the contentions of the Respondent with respect to the issues presented, and;

(b) the reasons for the contentions, and;

(c) citation to the authorities, statutes, and parts of the record relied upon.

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[15] FED. R. APP. P. 28(a)(2) states:

"A statement of the issues presented for review."

FED. R. APP. P. 28(a)(4) states:

"An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reason therefor, with citations to the authorities, statues and parts of the record relied on."

The Respondents brief:

(a) contends that the "judgment [condemnation judgment] cannot be a bar to litigation involving the recovery of those [inverse condemnation] damages."[16]

(b) states that the reason for that contention is that the "damages sought by JOLEEWU [Respondent] were clearly excluded form the commissioners' award by both applicable law and agreement of the parties."[17]

(c) contains citations to authority[18] and to the record.[19]

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[16] Res. App. at 5.

[17] Res. App. at 5.

[18] Case authority on equitable estoppel was not included among the authority cited in conjunction with the res judicata issue. Case authority on other points was cited. See Res.

The issues raised by an appeal brief are determined by a liberal reading of the brief.[20] A broad statement of an issue can be sufficient to raise another issue even though the overwhelming emphasis of the argument is on another related issue.[21]

Respondent's contention that res judicata should not apply, and the reasons for that contention, were clearly stated. That contention, combined with the citation to the record, was sufficient to raise the issue and apprise

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App. 1-5.

[19] Res. App. at 5.

[20] *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501 (5th Cir. 1981).

[21] *Sparks v. Duval County Ranch Co., Inc.*, 604 SF.2d 976 (5th Cir. 1979, aff. other grounds, 449 U.S. 24 1980).

both the Court of Appeals and Petitioner that the applicability of res judicata was being challenged because of the agreement of the parties at the condemnation hearing.

The Appeals Court has discretion to consider an issue not raised by Respondent's brief.

The Court of Appeals' consideration of an argument not properly presented is within it discretion.[22] That discretion has been exercised to consider an issue that was not raised in an appellant's brief when the opponent had not been misled and the issue fully explored.[23]

The absence of case authority did

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[22] *In re HECI Exploration Co., Inc.*, 862 F.2d 513 (5th Cir. 1988).

[23] *Ellingson, v. Burlington Northern, Inc.*, 653 F.2d 1327 (9th Cir. 1981).

not mislead Petitioner. The Respondent clearly argued that the agreement at the condemnation hearing prevented the application of res judicata. It is within the discretion of the Court of Appeals to consider that issue, even if it was not property presented.

CONCLUSION

The Court of Appeals held that res judicata was not applicable because of the agreement of Petitioner and Respondent at the condemnation hearing. The Respondent's Appeal Brief contends that res judicata should not apply because of the agreement of the parties at the condemnation hearing. The absence of a direct reference to case authority on equitable estoppel does not prohibit the Court of Appeals from basing its

decision on that legal theory.

Even if the Respondent's brief was insufficient to raise the issue, it is within the Court of Appeal's discretion to review that issue.

For those reasons, Respondent prays that the Petition for Writ of Certiorari to the Fifth Court of Appeals be denied.

Respectfully submitted,

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APPENDIX

PAGES 7-9 of RESPONDENTS APPEAL BRIEF TO THE COURT OF APPEALS

ARGUMENTS

Standard of Review

The dismissal of JOLEEWU's claims cannot be affirmed unless it appears beyond a doubt that no set of facts in support of the claims would entitle that party to relief. Conley v. Gibson, 355 U.S. 41, (1957). The allegations in the complaint should be construed favorably to the person making the claims. Scheuer v. Rhodes, 426 U. S. 432 (1974).

Plaintiff's Claims are not Barred

A. The Subsequent Condemnation Suit is Not Res Judicata to the Prior Inverse Condemnation Suit

The Court's opinion dismissing

JOLEEWU'S claims quotes the following language from Bonniwell v. Beech Aircraft Corporation, 663 S.W.2d 816, 818 (Tex. 1984):

"Res judicata is frequently characterized as claim preclusion because it bars litigation of all issues connected with a cause of action which, with the use of diligence, might have been tried in the prior suit". Id. at 818. The other cases cited in the trial court's order likewise refer to the case giving rise to the bar as the "former action" or "prior judgment offered in a subsequent action." It is clear that those cases are premised on the fact that the barred claims are those brought in the subsequent suit. The trial court, without explanation, then applies the doctrine to this case in the absence of

that prerequisite. Res judicata does not apply unless that prerequisite has been met; thus, the trial court erred.

B. A Subsequent Suit Cannot Divest A Court of Jurisdiction of Issues Properly Before the Court

The jurisdiction of a court of competent jurisdiction over a matter properly before it cannot be destroyed by a party bringing another action. Cockburn v. Noxon, 135 S.W. 2d (Tex. Civ. App. -- Galveston 1939, error ref'd.).

When two suits are filed involving the same subject matter, issues raised in the first suit are within the jurisdiction of that Court alone. Stanley v. Columbus State Bank, 258 S.W.2d 840, Tex. Civ.App. -- Fort Worth 1953,).

The actions of the Probate Court in the condemnation proceeding could not,

even if the claims in this case have been otherwise within its jurisdiction, adjudicate the claims raised in this case. The claims in this case are not barred by the judgment in the condemnation case.

C. Damages Prior to the Date of Taking Cannot Be Part of the Condemnation Award.

Damages in a condemnation case are determined by the fair market value of the property interest taken at the time of the taking. City of Fort Worth v. Corbin, 504 S.W.2d 828 (Tex. 1974), City of Austin v. Casiraglie, 656 S.W.2d 576 (Tex.Civ.App. -- Austin 1983). The date of the taking is when the condemnor lawfully takes possession or makes the required deposit into the Court. City of Fort Worth v. Corbin, supra.

Damages occurring prior to the date

of taking can be recovered from an entity that did not exercise its power of eminent domain prior to the injury. Gully v. Southwestern Bell Telephone Co., 774 F.2d 1287 (5th Cir. 1985). Those damages would be for the time period from the date of the damage or injury until the lawful taking of the property condemned. Id.

A judgment cannot be conclusive of any issue that could not have been adjudicated in that case. Davis v. First State Nat. Bank of Waco, 161 S.W.2d 467 (Tex.Comm.App. 1942).

The attorneys for both AUSTIN and JOLEEWU recognized that the commissioners' hearing was not the forum for such a recovery. (Tr. 167-170, Appendix). The damages sought by JOLEEWU in this case were clearly excluded from

the commissioners' award by both applicable law and agreement of the parties, thus the judgment cannot be a bar to litigation involving the recovery of those damages.

AUSTIN IS LIABLE FOR DAMAGES REGARDLESS OF THE GOVERNMENTAL OR PROPRIETARY NATURE OF ITS ACTIONS

In San Antonio River Authority v. Garett, 528 S.W.2nd 266 (Tex.Civ.App.--San Antonio 1977, ref'd, i.r.e.) the Court of Appeals held that the defense of governmental function is not available where the conduct of the government amounts to a taking and damaging within the provisions of Article I, Section 17 of the Texas Constitution.

In City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978) the City sought to escape liability for damages, asserting

that its actions were an exercise of its police power and thus immune as a governmental function. City of Austin v. Teague, supra, involved inverse condemnation by the City of Austin.

EXCERPT FROM CONDEMNATION HEARING STATEMENT OF FACTS INCLUDED IN RECORD EXCERPTS AT COURT OF APPEALS

No. 1656

STATE OF TEXAS	X	CONDEMNATION
AND CITY OF	X	PROCEEDINGS FILED
AUSTIN	X	IN THE COUNTY
	X	COURT
VS.	X	
	X	
JOLEEWU, LIMITED	X	AT LAW OF TRAVIS
ET AL	X	COUNTY, TEXAS

- -

APPEARANCES

ELLIOTT MITCHELL, Assistant City Attorney, Post Office Box 1088, 708 Colorado Street, Austin, Texas 78767.

FOR CONDEMNOR

ROBERT D. LYBRAND, 401 Expressway Tower, 6116 North Central Expressway, Dallas,

that correct?

A That is correct.

Q So you have a 20 percent vacancy rate over in the park?

A Yes - well, the park is a much greater vacancy in reality than what we gave it.

Q Do you know why the park's vacancy rate is much greater?

A I think I know why, it is much greater. Because, as you can see in my little handout, all of other parks and the competing parks in town are in the same boat.

Q Do you know why these trailers -- and I'm pointing specifically to the ones in the easement, do you know why they left the park?

A Yes, sir.

Q Could you tell us why they left the

park?

A To my understanding, they were removed through the federal aid relocation procedures, and they were moved as a part of this acquisition.

MR. MITCHELL: At this time I want to admonish the commissioners not to consider, prior to the date of taking, losses by reason of these trailers moved. There is another lawsuit pending. There is another inverse condemnation lawsuit pending which is complaining of our notice to these - the tenants of the mobile homes which are located in this area, because at that time we anticipated that we would be able to move forward with this suit on a much earlier time frame. Since it took longer than anticipated to get this parcel through the condemnation process, the tenants

were notified much in advance of the date of taking, which is obviously today's hearing, I believe sometime in September of '87.

So consequently, they have filed numerous condemnation suits against the city, which is a live pending inverse condemnation action.

MR. WILLIAMS: They, being the tenants or the landowner, but not a class action suit or ---

MR. MITCHELL: Right, so we have got the inverse condemnation action pending now against the city for the damages which arise out of that premature notification, if any.

So consequently, I am asking you-all not to consider that, because that is going to be taken care of by negotiations or by trial in that particular lawsuit.

Hopefully we will settle it. For purposes of this action, I ask that you consider it based on the testimony that Mr. Corbitt gave.

MR. LYBRAND: And I am in agreement with Mr. Mitchell. I only point that out and make the point that the low vacancy rate is not a natural occurrence in the market, that the low vacancy rate at this park, 12 of these were moved out.

MR. WURLITZER: Fifteen

MR. LYBRAND: Fifteen were moved out by the city, totaling 20 percent of our occupancy.

MR. MITCHELL: There is a disputed fact issue, though. If we are going to get into that, we would like to go ahead - if he is going to represent to you that 15 were moved out, we would like

to present testimony on how many moved out, and you know ---

MR. LYBRAND: Let me make my point. He is absolutely wrong on damages or anything occurring before today because these vacancies are not in here. But what I am saying is that some of those were not natural market and that the current occupancy is not all the result of natural market forces, in that it should be held against us for low market rate on something that was out of our control.

Mr. Williams: Your are saying there is